NO. 22361

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOLLOWAY HOUSE PUBLISHING CO.,
a California corporation,

Appellant,

vs.

WESLEY S. SHARP, individually, and as Chief of Police of the City of San Diego, and EDWARD T. BUTLER, Individually, and as City Attorney for the City of San Diego,

Appellees.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLANT'S OPENING BRIEF

This is an appeal from a judgment rendered by the Honorable Fred Kunzel, a Judge of the United States District Court for the Southern District of California, denying appellant's motion for summary judgment, granting appellees' cross motion for summary judgment, and dismissing this action in favor of appellees and against appellant.

JURISDICTION

The jurisdiction of the District Court was based upon R. S. 1979, 42 U.S.C. 1983, 42 U.S.C.A. 1983 and 28 U.S.C. 1343(3),

28 U.S.C.A. 1343(3), the action being one to redress the deprivation under color of statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to appellant by the Fourteenth Amendment to the United States Constitution. The jurisdiction of the District Court was further invoked under R.S. 1979, 42 U.S.C. 1983, 42 U.S.C.A. 1983 and 28 U.S.C. 1331, 28 U.S.C.A. 1331, the action being one wherein the matter in controversy exceeds the sum and value of $10,000.00, exclusive of interest and costs, and arises under the Constitution and laws of the United States.

The jurisdiction of this Court to review the judgment in question is based upon 28 U.S.C. 1291, 28 U.S.C.A. 1291 and Rule 73 of the Federal Rules of Civil Procedure.

The pleadings and facts disclosing the basis of the aforesaid jurisdiction are as follows:

The complaint seeking declaratory and equitable relief under R.S. 1979, 42 U.S.C. 1983, 42 U.S.C.A. 1983, 28 U.S.C. 1343(3), 28 U.S.C.A. 1343(3) and 28 U.S.C. 1331, 28 U.S.C.A. 1331 to redress the deprivation of appellant's rights, privileges and immunities secured by the Constitution and laws of the United States (R. 1-8) was filed on April 7, 1967 (R. 1). Appellees' answer (R. 11-52) was filed on May 8, 1967 (R. 11). On June 15, 1967 (R. 53), appellant filed its motion for summary judgment together with affidavits, exhibits and request to take judicial notice in support thereof (R. 53-77).

On June 20, 1967 (R. 180), appellees filed a cross motion

for summary judgment together with affidavit and exhibits in support thereof (R. 180-186, 125-163).

On July 20, 1967 (R. 187), the District Court rendered a memorandum order denying appellant's motion for summary judgment and granting appellees' motion for summary judgment (R. 187-188). On August 4, 1967 (R. 195), an order and judgment was entered denying appellant's motion for summary judgment, granting appellees' cross motion for summary judgment, and directing judgment in favor of appellees, dismissing the action with costs and disbursements in favor of appellees and against appellant (R. 195-196). Notice of appeal (R. 197-198) was filed on August 16, 1967 (R. 197).

STATEMENT OF THE CASE

1. The complaint alleges that appellant is a California corporation whose principal activity is the publishing of books for national distribution (R. 2) and that among the books published by appellant is a two-volume paperback edition of the writings of Marquis de Sade entitled The Complete Marquis de Sade, translated from the original French text by Dr. Paul J. Gillette (R. 3). The complaint alleges that the writings of Marquis de Sade are of great literary, philosophical, historical and psychological importance (R. 3-4), and that The Complete Marquis de Sade is expression and communication within the free speech and press guarantees of the First and Fourteenth Amendments, and that the publications

are not obscene or otherwise unlawful (R. 4).

It is alleged in the complaint that various owners of retail establishments and distributors have affirmed their readiness to enter into agreements with appellant for the sale and distribution of the aforesaid publications in the city of San Diego (R. 4). Appellees, the Chief of Police of the city of San Diego and the City Attorney for the city of San Diego, threaten to immediately and continuously prosecute the said owners and distributors under penal statutes prohibiting the sale and distribution of obscene books (R. 4). Solely for this reason the owners of retail establishments and distributors in the city of San Diego declined to enter into agreements or business relations with appellant with respect to the sale or distribution of the aforesaid publications in the city of San Diego, although otherwise ready, able and willing to enter into such agreements and business relations (R. 5). The complaint alleges that the conduct of the appellees is arbitrary and capricious, and that appellees threaten to continue in their unlawful conduct so as to permanently exclude the publications from sale and distribution in the city of San Diego (R. 5).

The complaint, in addition to the jurisdictional allegations (R. 1-2), alleges that the acts of appellees were committed under color of law (R. 5); that the conduct of appellees violates appellant's constitutional rights under the First and Fourteenth Amendments (R. 6); that appellees' conduct amounts to an unlawful interference with freedoms of speech and press (R. 6); that said conduct amounts to a previous restraint and restriction on the right of appellant to

circulate the aforesaid publications (R. 6); that appellees' conduct arbitrarily deprives appellant of its liberty and property without due process of law (R. 6); and that appellees assume to act as a censor of the press in direct violation of the fundamental law (R. 6).

The complaint further alleges that the conduct of appellees has caused and threatens to continue to cause irreparable loss and damage to appellant in its standing, reputation and prestige, business and good will (R. 6); that by reason of the conduct of appellees, appellant will suffer great financial loss and be subjected to great expense (R. 6); and that such conduct and threats to continue said course of conduct will deprive the community of the city of San Diego of its right to read books protected from interference and abridgment by the Constitution (R. 7); and that such conduct and threatened conduct has produced and will continue to produce immediate and irreparable injury and loss to appellant, for all of which appellant has no speedy, adequate, or other remedy at law (R. 7).

The prayer of the complaint is for a decree restraining appellees from hindering appellant or any owners of a retail establishment or distributors in the city of San Diego in the sale or distribution of The Complete Marquis de Sade by threats or other acts or practices which interfere with such sale or distribution in the city of San Diego (R. 7), and for a declaration that the conduct of appellees in asserting that the publications are obscene and objectionable is invalid and unauthorized by law and violative of the constitution; that the said publications are not obscene or otherwise

unlawful; and that said publications constitute expressions protected from governmental abridgment and restriction by the First and Fourteenth Amendments (R. 7-8).

2. The answer of appellees generally denies or denies knowledge or information sufficient to form a belief as to the truth of most of the allegations contained in appellant's complaint (R. 11-13). Appellees allege that on January 30, 1967, various owners, or their licensees and agents, of retail establishments engaging in the sale and distribution of the publications The Complete Marquis de Sade, in the city of San Diego, were arrested pursuant to the state obscenity statute (R. 12). Annexed to the answer are copies of criminal complaints filed against the aforesaid owners of the retail establishments (R. 14-52). Appellees also allege that appellant seeks a form of relief prohibited by principle and rule of comity, by doctrine of abstention and the provisions of 28 U.S.C. 2283 (R. 13), and that appellees are immune from the action (R. 3).

The prayer of the answer is that the court strike the allegations contained in paragraph 9 of the complaint (R. 3-4) as being immaterial; and that judgment be rendered for appellees and against appellant (R. 13).

3. Appellant moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (R. 53-54). In support of the motion for summary judgment, the affidavit of Bentley Morriss affirmed that he was the Vice President of appellant's corporation and the President of the All American

Distributors Corporation, a California corporation. The affidavit alleges that the writings of the Marquis de Sade have appeared in the United States in various editions for the past ten years and that appellant has attempted, by its publication, to present the first English language edition of the four major works of Marquis de Sade. The appellant chose Dr. Paul J. Gillette to translate, edit and adapt the edition of The Complete Marquis de Sade because he is one of the outstanding scholars in classical and modern languages and literature in the United States. Dr. Gillette's expertise is extensive (R. 56-57).

The affidavit of Bentley Morriss further affirms that over 60,000 sets of The Complete Marquis de Sade have been distributed in 49 states throughout the United States, in virtually every major city in the United States, and in approximately 20 foreign countries. Advertisements for The Complete Marquis de Sade were accepted and appeared on various dates in 1966 and 1967 in the New York Times, the Los Angeles Times, the Philadelphia Inquirer, National Best Sellers, and in Publishers Weekly (R. 57). No criminal actions involving the publications, other than the ones instituted in the city of San Diego, have taken place anywhere in the United States (R. 58).

It is further alleged in the affidavit that the writings of de Sade have received wide publication and distribution and have been published in various editions. The ideas of de Sade have been discussed by literally hundreds of writers and scholars in the varied fields of literary criticism, psychology, philosophy and

history. Contemporary literary critics, writing in such publications as the New York Times, Book Week, News Week and Saturday Review, have stressed the importance of de Sade's writings (R. 58). The affidavit stresses the social importance of the writings of de Sade, as well as the fact that the descriptions of sex contained therein are within customary freedom of expression (R. 58-59).

The affidavit states that the conduct of appellees in admittedly arresting and prosecuting various owners of retail establishments engaged in the sale and distribution of The Complete Marquis de Sade has brought to a halt the circulation of the said publications in the city of San Diego, despite the fact that owners of retail establishments are willing to enter into agreements with appellant for the sale and distribution of the said publications (R. 59). It is affirmed that the conduct of the appellees and their threats to continue such unlawful conduct has resulted, and will result, in permanently excluding the publications from sale and distribution in the city of San Diego, and that such curtailment of circulation will cause appellant to suffer substantial and irreparable loss and damage, for which he has no adequate remedy at law (R. 59-60).

Also submitted with the motion for summary judgment were requests for the Court to take judicial notice of rulings of the United States Supreme Court and other courts in federal and state jurisdiction holding comparable material to be constitutionally protected under the First and Fourteenth Amendments to the United

States Constitution (R. 63-77).

In opposition to appellant's motion for summary judgment as aforesaid, appellees interposed a memorandum of points and authorities (R. 164-166). The gist of appellees' legal argument was that "triable issues of fact exist as to the question of obscenity" and that the doctrine of abstention was applicable.

4. At the same time, appellees filed a cross motion for summary judgment (R. 180-181). In support of the cross motion the affidavit of Kenneth H. Lounsberry, Deputy City Attorney of the city of San Diego, alleged that various arrests had been made of different owners of retail establishments for the sale and distribution of The Complete Marquis de Sade in purported violation of the state obscenity statute (R. 182-186), and incorporated therein were copies of the criminal complaints against the various retail owners (R. 125-163). A memorandum of points and authorities in support of said cross motion for summary judgment emphasized that appellant was allegedly barred from seeking relief by the doctrine of abstention and that appellant had failed to show irreparable injury (R. 167-179).

5. A memorandum order was rendered by the District Court denying appellant's motion for summary judgment and granting appellees' motion for summary judgment (R. 187-188). The District Court noted that it appeared from the affidavit in support of appellant's motion for summary judgment that San Diego is the only place in the United States where prosecutions were pending, despite the wide distribution of the book, and that other affidavits

filed by appellant attest to the book's "redeeming social value" (R. 187). The District Court noted that appellees contended that the Court should abstain from acting, pending a decision by the state courts (R. 187-188). The District Court stated:

> "Having in mind the case of Redrup v. State of New York, 35 L. W. 4396 (U. S. Supreme Court, May 8, 1967), a conclusion cannot be reached that plaintiff's constitutional rights are being violated by the prosecution or threatened prosecution of distributors and sellers of the book." (R. 188).

Judgment was rendered accordingly (R. 195-196).

The questions involved in the light of the foregoing are as follows: (a) whether, contrary to law, the Constitution and the applicable decisions of the United States Supreme Court, the District Court erred in dismissing the action; (b) whether, contrary to law, the Constitution and the applicable decisions of the United States Supreme Court, the doctrine of abstention was properly invoked in the case herein; (c) whether, contrary to law, the Constitution and the applicable decisions of the United States Supreme Court, the District Court erred in granting appellees' cross motion for summary judgment; (d) whether, contrary to law, the Constitution and the applicable decisions of the United States Supreme Court, the District Court erred in denying appellant's motion for summary judgment; (e) whether the judgment and order of the District Court deprives appellant of rights guaranteed by law and rights guaranteed by the Constitution of the United States,

including the free speech and press and due process provisions of the First and Fourteenth Amendments.

SPECIFICATION OF ERRORS

1. The District Court erred in dismissing the action, contrary to law, the Constitution and the applicable decisions of the United States Supreme Court.

2. The District Court erred in invoking the doctrine of abstention, contrary to law, the Constitution and the applicable decisions of the United States Supreme Court.

3. The District Court erred in granting appellees' cross motion for summary judgment, contrary to law, the Constitution and the applicable decisions of the United States Supreme Court.

4. The District Court erred in denying appellant's motion for summary judgment, contrary to law, the Constitution and the applicable decisions of the United States Supreme Court.

5. The District Court erred in rendering the order and judgment in the cause herein, contrary to the rights guaranteed to appellant by law and the Constitution of the United States.

SUMMARY OF ARGUMENT

The facts alleged in appellant's complaint show that appellees, while acting under color of law, deprived and threatened to deprive appellant of rights secure to appellant by the provisions of the First

and Fourteenth Amendments and the laws of the United States. It is established that an action under the Civil Rights Act will not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The complaint herein for declaratory and injunctive relief was clearly not subject to dismissal.

The thrust of the complaint is directed against the censorship imposed by appellees in the City of San Diego with respect to the publication, The Complete Marquis de Sade. The complaint did not seek to enjoin any state criminal prosecution; it sought only a declaration that appellees were engaged in conduct which constitutes a prior restraint on the circulation of a publication entitled to constitutional protection, and that appellees be enjoined from such unlawful conduct. The precise issue has been decided by this Court in Corsican Productions v. Pitchess, 338 F. 2d 441 (9 Cir., 1964), holding that a similar complaint against local officials was erroneously dismissed by a district court.

Abstention, under the circumstances here presented, constitutes an abdication of federal judicial responsibility to exercise jurisdiction conferred by the Congress and the Constitution for the protection of federally created rights. Appellant was not compelled to seek relief in any form in any state court because the assertion of a federal claim in a federal court does not have to await an attempt to vindicate the same claim in a state court. That the doctrine of abstention was inappropriately invoked by the court below is clear

from the recent decision of the United States Supreme Court in Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 291, 19 L. Ed. 2d 444, and other decisions of the Supreme Court in the same area.

The District Court erred in granting appellees' cross motion for summary judgment. The cross motion was no more than a motion to dismiss the complaint, based on the doctrine of abstention. Appellant's standing to institute the action herein cannot be successfully questioned. Appellant has suffered palpable injury as a result of the actions of appellees acting under color of law. Appellant is not arguing another's constitutional rights. The constitutional guarantee of freedom of the press includes both the publication and circulation of books. The direct and obviously intended result of appellees' activities is to curtail the circulation in the City of San Diego of The Complete Marquis de Sade, published by appellant.

The District Court erred in denying appellant's motion for summary judgment. At the very least, if the District Court believed that triable issues were presented, then the case should have been set down for trial and determination.

In opposition to appellant's motion for summary judgment, appellees themselves argued that triable issues of fact exist as to the question of obscenity. However, on the uncontradicted record presented below, appellant established in support of its motion for summary judgment that the publication was not obscene and entitled to constitutional protection. The uncontradicted record showed that the publication does not exceed contemporary community

standards in the depiction of sex, does not appeal to a prurient interest, and has great social importance. Nevertheless, if the District Court felt that the issue could not be decided as a matter of law and that a hearing was necessary to establish that the publication was entitled to constitutional protection, then the District Court should have ordered a hearing and taken evidence instead of dismissing the action. Dismissal of the action deprived the appellant unlawfully of access to the federal court and deprived it of fundamental legal and constitutional rights guaranteed to appellant by the laws and the Constitution of the United States.

ARGUMENT

I

THE FACTS ALLEGED IN THE COMPLAINT SHOW THAT APPELLEES, WHILE ACTING UNDER COLOR OF LAW, DEPRIVED AND THREATENED TO DEPRIVE APPELLANT OF RIGHTS SECURED TO APPELLANT BY THE PROVISIONS OF THE FIRST AND FOURTEENTH AMENDMENTS AND THE LAWS OF THE UNITED STATES. SINCE APPELLANT PRESENTED A PROPER CLAIM FOR DECLARATORY AND EQUITABLE RELIEF, THE DISTRICT COURT ERRED IN INVOKING THE DOCTRINE OF ABSTENTION.

(a) Appellant discusses initially in this brief the sufficiency of the cause of action stated in the complaint. Appellant contends that the complaint states a claim upon which relief could be granted by a federal district court. Under these circumstances, it is urged that the doctrine of abstention was improperly invoked

by the District Court.

In the points which follow, appellant discusses the motions for summary judgment which were made by the respective parties. It is there asserted that appellees' cross motion for summary judgment was essentially no more than a motion to dismiss the complaint on the sole ground of abstention. It is then urged that appellant's motion for summary judgment should have been granted or, in the alternative, the case should have been set down for trial.

It is, of course, the accepted rule that an action will not be dismissed for failure to state a claim, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80; Marshall v. Sawyer, 301 F. 2d 639 (9 Cir. 1962); Cohen v. Norris, 300 F. 2d 24 (9 Cir. 1962); York v. Story, 324 F. 2d 450 (9 Cir. 1963).

In the light of the aforesaid general rule, it is clear that the complaint herein is not subject to dismissal. The complaint alleges that appellant published a two-volume paperback edition of the writings of Marquis de Sade, entitled The Complete Marquis de Sade; that various owners of retail establishments and distributors wished to sell and distribute the publication in the city of San Diego; that the Chief of Police and City Attorney of that city (the appellees) threatened to prosecute the owners of retail establishments and distributors of the publication under the state obscenity statute; that solely because of appellees' conduct the sale and distribution

of the publication in the city of San Diego was, and will continue to be, prevented. Appellant prayed for a declaration that the conduct of appellees was unauthorized by law and violative of the Constitution, and that the publication was constitutionally protected, and for an order restraining appellees from interfering with the sale and distribution of the publication.

It is plain that the thrust of the complaint herein is directed against the censorship which appellees have invoked. The complaint did not allege that appellant had been subjected to any criminal prosecution, nor did the complaint seek to enjoin any state prosecution. What the appellant sought in the complaint was a declaration that appellees were engaged in conduct, by threats of prosecution and other acts, which constituted a censorship and prior restraint on the circulation of a writing ordinarily protected from governmental infringement by the Constitution of the United States, and that appellees be enjoined from such unlawful conduct. That such "informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief" is well established. Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 67-68, 83 S. Ct. 631, 9 L. Ed. 2d 584. See also, Freedman v. Maryland, 380 U. S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649; Zenith Int'l Film Corp. v. City of Chicago, 291 F. 2d 785 (7 Cir. 1961); Capital Enterprises, Inc. v. City of Chicago, 260 F. 2d 670 (7 Cir. 1958); Columbia Pictures Corp. v. City of Chicago, 184 F. Supp. 817 (D. C. Ill. 1959); In re Louisiana News Co. v. Dayries, 187 F. Supp. 241 (D. C. La. 1960) opinion by three-judge Court; HMH Pub. Co. v.

Garrett, 151 F. Supp. 903 (D.C. Ind. 1957); Dearborn Pub. Co. v. Fitzgerald, 271 Fed. 479 (D.C. Ohio 1912); New American Library of World Literature v. Allen, 114 F. Supp. 823 (D.C. Ohio, 1953).

The precise issue has, in any event, been decided by this Court. Corsican Productions v. Pitchess, 338 F.2d 441 (9 Cir. 1964). In that case, the producer of a motion picture film filed a complaint under the same Civil Rights Act as is involved herein, seeking declaratory and injunctive relief as well as damages. The complaint similarly alleged that various motion picture exhibitors wished to exhibit the film in the County of Los Angeles and that the Deputy Sheriff and District Attorney of that county threatened to prosecute exhibitors of the film under the state penal statute. The complaint was dismissed in the District Court on the ground that it did not state a claim upon which relief could be granted and that abstention was required as a matter of comity. This Court reversed and held that the producer had standing to institute the action, that the complaint stated a claim for relief against the censorship initiated by the local officials in the County of Los Angeles.

(b) It is now settled that abstention under the circumstances here presented constitutes an abdication of federal judicial responsibility to exercise jurisdiction conferred by the Congress and the Constitution for the protection of federally created rights. In Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 291, 19 L.Ed.2d 444 (decided December 5, 1967), the state statute made it a crime

to distribute handbills in an election anonymously. An accused was convicted of violating the statute, but obtained a reversal on state law grounds. Thereafter, the same person instituted an action in the federal district court under the Civil Rights Act, seeking declaratory and injunctive relief upon the ground that the state statute was invalid on its face under the First Amendment and an injunction was required to prevent further prosecution under the said law. A three judge court applied the doctrine of abstention and dismissed the case. The United States Supreme Court reversed, holding that abstention was inappropriate, insofar as declaratory relief had been sought, wholly apart from the question as to whether injunctive relief could or could not be granted. The Supreme Court held,

1) that the Civil Rights Act imposes "the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims" (88 S. Ct. at 395);

2) that the doctrine of abstention sanctions escape from such statutory duty only in "narrowly limited 'special circumstances' " (88 S. Ct. at 395); where a construction or interpretation of a statute is not involved, it is the duty of a federal court to decide all federal constitutional questions presented to it;

3) that abstention "cannot be ordered simply to give state courts the first opportunity to vindicate the

federal claim" (88 S. Ct. at 397);

4) that a plaintiff who has commenced a federal action may not be required to suffer the delay of state court proceedings, which delay "might itself effect the impermissible chilling of the very constitutional right he seeks to protect" (88 S. Ct. at 397-398);

5) that a request for a declaratory judgment must be considered independently of any request for injunctive relief; a federal district court "has the duty to decide the appropriateness and the merits of the declaratory request, irrespective of its conclusion as to the propriety of the issuance of the injunction". (88 S. Ct. at 399).

See also, Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492; Reynolds v. Sims, 377 U.S. 533, 566, 84 S. Ct. 1362, 12 L. Ed. 2d 506; Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22; McNeese v. Bd. of Education etc., 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622; Keyishian v. Bd. of Regents, 385 U.S. 589, 87 S. Ct. 675; Baggett v. Bullitt, 377 U.S. 360, 87 S. Ct. 1316, 12 L. Ed. 2d 377; Corsican Productions v. Pitchess, 338 F. 2d 441 (9 Cir. 1964).

Here, the appellant publisher and distributor instituted an action in the federal courts under the Civil Rights Act, seeking a declaration that the threats and other acts and conduct of appellees constituted an impermissible restraint on the circulation of appellant's publication, in violation of the free speech and press and

due process provisions of the First and Fourteenth Amendments, and appellant sought a declaration that the publication involved was entitled to constitutional protection because it was not obscene nor otherwise unlawful. The appellant sought to enjoin such threats and unlawful conduct, and did not seek to restrain any state criminal prosecutions. Under the circumstances, it was the plain duty of the District Court, it is submitted, under the applicable decisions of the United States Supreme Court, to adjudicate the subject matter of the action. Appellant was not compelled to seek relief in any form in any state court because the assertion of a federal claim in a federal court does not have to await "an attempt to vindicate the same claim in a state court". Zwickler v. Koota, 88 S. Ct. at 397.

II

THE DISTRICT COURT ERRED IN GRANTING APPELLEES' CROSS MOTION FOR SUMMARY JUDGMENT. THE CROSS MOTION WAS NO MORE THAN A MOTION TO DISMISS THE COMPLAINT, BASED ON THE DOCTRINE OF ABSTENTION, AND THE GRANT OF SUCH MOTION CONSTITUTED AN ABDICATION OF JUDICIAL RESPONSIBILITY REQUIRED BY LAW AND A DEPRIVATION OF APPELLANT'S RIGHTS UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

The sole affidavit in support of appellees' cross motion for summary judgment (R. 180-181) was made by a Deputy City Attorney of the City of San Diego (R. 182-186). The affidavit recited essentially no more than a history of the prosecutions instituted

against certain owners of retail establishments in the City of San Diego who were charged with distributing The Complete Marquis de Sade in violation of the state obscenity statute. The memorandum of points and authorities in support of the motion (R. 167-179) emphasized solely that appellant was seeking a form of relief allegedly prohibited by principles of comity, the doctrine of abstention and 28 U. S. C. 2283 involving grants of injunctions by a federal court staying proceedings in a state court. The memorandum order of the District Court noted that the contention of appellees was that the Court should abstain from acting, pending decision by the state courts, the appellees relying principally upon a ruling of the Court of Appeals for the Third Circuit. Outdoor American Corporation v. Philadelphia, 333 F. 2d 963 (1964) (R. 187-188).

Reliance upon Outdoor American Corporation by appellees is obviously misplaced. In the first place, actual criminal prosecutions had been instituted against one of the plaintiffs and injunction relief was sought against pending criminal prosecutions. In the second place, the Court of Appeals for the Third Circuit placed principal reliance upon the decision of the Supreme Court in Douglas v. City of Jeannette, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, a case which this Court, in Corsican Productions v. Pitchess, 338 F. 2d 441, 443, held was inapplicable under the circumstances presented by the facts and pleadings. In the third place, the recent decision of the United States Supreme Court in Zwickler v. Koota, 389 U. S. 241, 88 S. Ct. 291, 19 L. Ed. 2d 444, makes clear that

abstention is not appropriate where declaratory relief is sought, wholly apart from questions relating to the grant of injunctive relief.

Moreover, it should be noted that the Supreme Court stated in Zwickler v. Koota: "It is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss." (88 S. Ct. at 399, f. n. 4).

The fact is that no grounds were presented by appellees which justified the granting of the cross motion for summary judgment below. The appellees admitted that they had instituted prosecutions against some nine different individuals for alleged violations of the state obscenity statute by reason of the distribution of The Complete Marquis de Sade. It was undisputed and clearly obvious that the actions of appellees had made it impossible for appellant to enter into any business relations with any retail book seller in the City of San Diego and that an effective censorship had been placed upon the publication by reason of the conduct of appellees. As the Supreme Court has time and again indicated, it is completely irrelevant, in an action in a federal court seeking declaratory and injunctive relief under the Civil Rights Act, for law officers to assert that pending criminal prosecutions against retailers are an obstacle to the assertion of fundamental legal and constitutional rights in the federal courts under a congressional enactment. As was stated in Drombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22:

"A criminal prosecution under a statute regulating

expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. . . . The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U.S. at 379, 84 S. Ct. at 1326. For '(t)he threat of sanctions may deter * * * almost as potently as the actual application of sanctions. * * * ' NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405. . . . Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." (380 U.S. at 486-487). See also Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 291, 19 L. Ed. 2d 444.

Appellant's standing to institute the action herein cannot be successfully questioned, it is submitted. The appellant has, in fact, suffered palpable injury as a result of the acts alleged to violate federal law, and the injury is a legal injury caused by violations of the Constitution of the United States. If this were a private action, it would present the claim, plainly justiciable, of unlawful interference in advantageous business relations. So far as

appellant's standing is concerned, it makes no difference that the allegedly unlawful interference is the product of state action. Moreover, appellant is not arguing another's constitutional rights. The constitutional guarantee of freedom of the press embraces both the publication and circulation of books as well. The direct and obviously intended result of appellees' activities is to curtail the circulation in the City of San Diego of The Complete Marquis de Sade published by appellant. See, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 f.n. 6, 83 S. Ct. 631, 636, 9 L.Ed.2d 584.

III

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT. AT THE VERY LEAST, IF THE DISTRICT COURT BELIEVED THAT TRIABLE ISSUES WERE PRESENTED, THEN THE CASE SHOULD HAVE BEEN SET DOWN FOR TRIAL AND DETERMINATION. THE JUDGMENT AND ORDER OF THE DISTRICT COURT DEPRIVES APPELLANT OF RIGHTS GUARANTEED TO APPELLANT BY LAW AND THE PROVISIONS OF THE CONSTITUTION.

(a) In opposition to appellant's motion for summary judgment, the appellees presented only two arguments in their memorandum of law:

1. "Triable issues of fact exist as to the question of obscenity." (R. 164-165).

2. "The doctrine of abstention." (R. 166).

On the other hand, the appellant, in support of its motion for summary judgment, established without contradiction in the record that The Complete Marquis de Sade has been distributed in 49 states throughout the United States, in virtually every major city in the United States and approximately 20 foreign countries (R. 57). It was undisputed that advertisements had been accepted and appeared in leading newspapers and magazines with regard to the publication (R. 57). The fact that the writings of de Sade have great social importance was also not contradicted in any respect. That The Complete Marquis de Sade would appeal to a person's interest in literature, the arts, philosophy, history, psychiatry and political science was also undisputed (R. 58-59). The papers in support of the motion also demonstrated that books and other media of communication, with far less social importance and with equal candor and description of sex, had received judicial approval by the United States Supreme Court and the highest courts of various state jurisdictions (R. 63-77). See, Grant v. United States, 380 F.2d 478 (9 Cir. 1967), holding that the books Swish! Bottom!, Screaming Flesh and The Holdout are entitled to constitutional protection. See also, Grove Press, Inc. v. Gerstein, 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 1305 (Tropic of Cancer); Tralins v. Gerstein, 378 U.S. 576, 84 S. Ct. 903, 12 L. Ed. 2d 1033 (Pleasure Was My Business); Memoirs v. Massachusetts, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (Fanny Hill); Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (Lust Pool and Shame Agent); Aday v. United States, 388 U.S. 447,

87 S. Ct. 2095, 18 L. Ed. 2d 1309 (Sex Life of a Cop); Books, Inc. v. United States, 388 U.S. 449, 87 S. Ct. 2098, 18 L. Ed. 2d 1311 (Lust Job); Quantity of Copies of Books v. Kansas, 388 U.S. 452, 87 S. Ct. 2104, 18 L. Ed. 2d 1314 (Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinners Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden and Flesh Avenger); Corinth Publications, Inc. v. Wesberry, 388 U.S. 448, 87 S. Ct. 2096, 18 L. Ed. 2d 1310 (Sin Whisper); Keney v. New York, 388 U.S. 440, 87 S. Ct. 2091, 18 L. Ed. 2d 1302 (Sin Servant, Lust School and Lust Web); Mazes v. Ohio, 388 U.S. 453, 87 S. Ct. 2105, 18 L. Ed. 2d 1315 (Orgy Club); Friedman v. New York, 388 U.S. 441, 87 S. Ct. 2091, 18 L. Ed. 2d 1303 (publications entitled: "Bondage Boarding School", "English Spanking School", "Bound and Spanked", "Sweeter Gwen", "Travelling Saleslady Gets Spanked", "Bound to Please", "Bizarre Summer Rivalry", "Heat Wave", "Escape Into Bondage, Book No. 2"); Sheperd v. New York, 388 U.S. 444, 87 S. Ct. 2093, 18 L. Ed. 2d 1306 (sets of photographs and publications entitled: "Promenade Bondage", "Spanking Nurses", "Spanking Sisters" and "Bondage"); Avansino v. New York, 388 U.S. 446, 87 S. Ct. 2093, 18 L. Ed. 2d 1308 (packets of photographs and publication entitled "Promenade Bondage Vol. 4"); Chicago v. Kimmel, 31 Ill. 2d 200, 201 N.E. 2d 386 (1964) (Campus Mistress and Born to be Made); People v. Bruce, 31 Ill. 2d 459, 202 N.E. 2d 497 (1964) (allegedly obscene performance); Chicago v. Universal Publishing & Distributing Corp., 34 Ill. 2d 250, 215 N.E. 2d 251 (1966) (Instant Love, Marriage

Club, Love Hostess, The Shame of Jenny, High-School Scancal, Her Young Lover and Cheater's Paradise); People v. Romaine, 38 Ill. 2d 325, 231 N. E. 2d 413 (1967) (Fanny Hill) and Commonwealth v. Dell Publications, Inc., et al., 233 A. 2d 840 (Pa. 1967), holding the book Candy to be entitled to constitutional protection.

On the undisputed record, therefore, it is submitted that appellant was entitled to summary judgment in declaring that the publication, The Complete Marquis de Sade, is entitled to constitutional protection and that the censorial activities of the appellees should be restrained.

(b) On this issue, the memorandum opinion of the District Court merely states the following:

> "Having in mind the case of Redrup v. State of New York, 35 L. W. 4396 (U. S. Supreme Court, May 8, 1967), a conclusion cannot be reached that plaintiff's constitutional rights are being violated by the prosecution or threatened prosecution of distributors and sellers of the book."

In Redrup v. New York, 386 U. S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515, the Supreme Court rendered a per curiam opinion in three consolidated state cases involving attempts by different states to suppress distribution of books and magazines through criminal or civil proceedings. In one case (Redrup), the books involved were entitled Lust Pool and Shame Agent. In the second case (Austin), there were two magazines involved entitled "High

Heels" and "Spree". In the third case (Gent), the magazines involved were "Gent", "Swank", "Bachelor", "Modern Man", "Cavalcade", "Gentlemen", "Ace" and "Sir".

The Supreme Court held that all of the aforesaid material was entitled to constitutional protection. The Court stated: "We have concluded, in short, that the distribution of the publications in each of these cases is protected by the First and Fourteenth Amendments from governmental suppression, whether criminal or civil, in personam or in rem." (386 U. S. at 770).

It is not clear from the memorandum opinion of the District Court as to what the reference to Redrup was intended to signify. The Court indicates that a conclusion cannot be reached that appellant's constitutional rights are being violated by the prosecution of retail book sellers in the light of Redrup. If this was intended to mean that the District Court thought it proper to invoke the doctrine of abstention in the light of the Redrup decision, then it is respectfully submitted the Court was in error. As has heretofore been discussed, appellant was seeking declaratory relief with respect to the censorial activities of appellees and the right of the publication to constitutional protection. Appellant was not requesting any injunctive relief against state criminal prosecutions. The decisions by the United States Supreme Court in Redrup itself supports the view that appellant's constitutional rights were being violated by the conduct of appellees and appellant was entitled to seek relief in a federal forum under a federal law granting the federal district court power and jurisdiction to grant the relief requested. The

decisions in Zwickler v. Koota, 389 U.S. 241. 88 S. Ct. 291, 19 L. Ed. 2d 444; Drombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22; Corsican Productions v. Pitchess, 338 F. 2d 441, 443; and other decisions heretofore cited clearly establish appellant's right to relief.

The memorandum opinion of the District Court may, on the other hand, indicate that the District Court felt that the issue could not be decided as a matter of law. As was noted aforesaid, the appellees urged that triable issues of fact allegedly existed as to the question of obscenity. If the District Court was of this view, then it is submitted that the case should have been set down for trial instead of rendering a judgment dismissing the action. (Federal Rules of Civil Procedure, Rule 56).

In determining whether a publication is not obscene and entitled to constitutional protection, "three elements must coalesce: it must be established that (a) the dominant theme of the material, taken as a whole, appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value". Memoirs v. Massachusetts, 383 U.S. 413, 418, 86 S. Ct. 975, 977, 16 L. Ed. 2d 1. Each of the three aforesaid federal constitutional criteria must be applied independently.

Appellant's motion for summary judgment amply established without essential contradiction that The Complete Marquis de Sade

does not go beyond contemporary community standards in depiction of sex; does not appeal to a prurient interest, i. e., a shameful or morbid interest in sex; and has great social importance. See, Culbertson v. California, 385 F. 2d 209 (9 Cir. 1967), reversing a judgment of the United States District Court for the Southern District of California and directing that a petition for writ of habeas corpus be granted, upon the ground that the conviction of a retail owner under the state obscenity statute was unconstitutional, based upon material entitled to constitutional protection under the decisions of the United States Supreme Court in Redrup and other related cases.

Nevertheless, if the District Court was uncertain as to whether the questions presented could be decided as a matter of law, then the issues of contemporary standards, prurient interest and social importance should have been set down for trial for appropriate disposition. Cf. Commonwealth v. Moniz, 336 Mass. 178, 143 N. E. 2d 196 (1957), 155 N. E. 2d 762 (1959). Dismissal of the action deprived appellant unlawfully of access to the federal courts and deprived it of fundamental legal and constitutional rights guaranteed to appellant by the laws and the Constitution of the United States.

CONCLUSION

For all the foregoing reasons, the judgment in order of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stanley Fleishman
STANLEY FLEISHMAN